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Singapore Court of Appeal rules on controversial summary dismissal case

In the 2015 case of *Iouri Piattchanine v Phosagro Asia Pte Ltd* [2015] 5 SLR 1257, the High Court found that the breaches by an employee of his fiduciary duties, as well as his express and implied contractual duties were nonetheless insufficient to justify his summary dismissal by his employer for serious misconduct or wilful breach on the facts.

The long awaited Court of Appeal's decision came out on 28 October 2016, overturning the High Court's finding that the employee was not guilty of serious misconduct. This update takes a look at the Court of Appeal's decision.

THE FACTS

Background and contractual framework

The facts of the case are set out in our previous case law update in February 2016 [<http://www.linklaters.com/pdfs/mkt/singapore/A31251456.pdf>]. As a brief recap, Iouri Piattchanine (the “**Respondent**”) owned a business in the fertilising trade industry, which he sold to Phosagro in February 2013. The Respondent was to continue to be employed as Managing Director of the business in Singapore, which had been renamed Phosagro Asia Pte Ltd (the “**Appellant**”), pursuant to an employment contract which he drafted and finalised (the “**Contract**”). The material terms of the Contract included:

- Clause 3, which provided that the Respondent was required to faithfully serve the Appellant in all respects and use his best endeavours to promote the interests of the Appellant; and
- Clause 20, which provided that the Appellant could terminate the Contract without notice or payment in lieu of notice in the case of serious misconduct or wilful breach or non-observance of any terms of the Contract.

The expenses accounting practice

The Respondent had continued operating an expenses accounting practice which he had put in place before the sale to Phosagro. On a monthly basis, the Respondent would submit his personal credit card statement (together with supporting receipts) to Tricor, the Appellant's external accountant, and

wrote cheques to himself for the full reimbursement. The Respondent would use his credit card for both business and personal expenses. At the end of each financial year, Tricor was tasked to identify which personal expenses were not corporate expenses (without any form of classification as professional or personal expense being provided by the Respondent on the underlying receipts) and the Respondent would arrange to reimburse those.

The High Court found that the Respondent's practice of claiming for personal expenses during the year, and only reimbursing the Appellant for these expenses when and if Tricor raised queries at the end of the financial year, could not be said to be in the interest of the Appellant. By adopting such practice, there was a likelihood that not all the personal expenses claimed by the Respondent would be reimbursed to the Appellant since it would have been impossible for Tricor to determine which of the claimed expenses were legitimate corporate expenses and which were the Respondent's personal expenses. In this regard, the High Court found that the Respondent had breached (i) Clause 3 of the Contract, (ii) his implied contractual duty to serve the Appellant with good faith and fidelity and (iii) his fiduciary duty to act in the best interest of the Appellant. However, notwithstanding the above breaches, the High Court held that the Respondent was not guilty of serious misconduct or wilful breach for purposes of Clause 20 of the Contract.

The appeal

The Appellant appealed against the High Court's decision. One of the main issues considered by the Court of Appeal was whether the Respondent was guilty of serious misconduct and/or wilful breach of the Contract under Clause 20 of the Contract.

THE COURT OF APPEAL DECISION

The common law principles relating to discharge of breach

In the absence of any guidance from the terms of the Contract itself, the Court of Appeal turned to the common law principles relating to discharge by breach (i.e. a repudiatory breach) as the guidelines to determine whether there had been "serious misconduct".

The Court of Appeal cited the case of *RDC Concrete Pte Ltd v Sato Kogyo (S) Pte Ltd and another appeal [2007] 4 SLR(R) 413* ("**RDC Concrete**"), where the court noted that there were four situations in which a breach of contract would amount to a repudiatory breach:

- **Situation 1:** where the contract clearly and unambiguously stated that, in the event of a certain event or events occurring, the innocent party would be entitled to terminate the contract.
- **Situation 2:** where a party, by his words or conduct, simply renounced his contract inasmuch as he clearly conveyed to the other party that he would not perform his contractual obligations at all.
- **Situation 3(a):** the condition/warranty approach where the focus is on the nature of the term breached and, in particular, whether the

intention of the parties to the contract was to designate that term as one that is so important that any breach, *regardless of the actual consequences of such a breach*, would entitle the innocent party to terminate the contract.

- **Situation 3(b)**: where the focus is on the nature and consequences of the breach; in particular, where the breach in question gave rise to an event which would deprive the innocent party of substantially the whole benefit which it was intended that he should obtain from the contract.

The Court of Appeal held that the legal principles in *RDC Concrete* are of general application to all contracts.

Situation 3(a): Breach of condition

In furtherance of the view that the concept of “serious misconduct” had to be read and applied in the context of the employment contract as a whole, the Court of Appeal held that “serious misconduct” would include the breach of important term(s) of the contract itself (i.e. the conditions under Situation 3(a) in *RDC Concrete*). The breach of such material terms would enable the employer to elect the employment contract as discharged, regardless of the nature and consequences of the breach.

In considering whether a contractual term was a “condition”, the ultimate focus would be on ascertaining the intention of the contracting parties by construing the actual Contract itself (including the relevant contractual term (Clause 3)) in light of the surrounding circumstances as a whole.

On the facts, the Court of Appeal noted that the Respondent was in a unique position of being entrusted with a significant degree of authority, responsibility and independence in the conduct of the Appellant’s affairs. For example, the Respondent had the sole authority to reimburse himself and another executive director of the Appellant for the expenses which they had incurred. In addition and quite significantly in this case, the Respondent had previously owned the business but was now employed by the Appellant. He therefore had a duty to ensure that he did not take advantage of his insider knowledge to further his own interests, but those of the Appellant instead.

In that context, “*with such trust being reposed in the Respondent*”, the Court held that Clause 3 “*would have been intended by the parties to be of the utmost importance*”. In this regard, Clause 3 was held to be a “condition” of the Contract and a clear breach of such condition by the Respondent did constitute “serious misconduct” for the purpose of Clause 20.

Situation 3(b): Deprivation of substantially the whole benefit of the Contract

Although the above finding would be sufficient to allow the appeal, the Court of Appeal went on to consider if the Respondent’s conduct could fall under the scope of Situation 3(b) in *RDC Concrete*. The Court found that the Respondent’s breach of Clause 3 through the utilisation of the expense accounting practice did not detract from his overall contributions to the

Appellant. As such, the Respondent's particular breach did not deprive the Appellant of substantially the whole benefit of the Contract which it was intended that the Appellant should have.

Wilful Breaches

For completeness, the Court of Appeal also considered whether there were "wilful breaches" of the Contract by the Respondent under Clause 20. The Court found that the breaches were not "wilful" as the Respondent had genuinely believed that he was entitled to claim his credit card bill without differentiating business from personal expense so long as he reimbursed the Appellant at the end of the financial year, notwithstanding the fact that they constituted breaches of contract.

Application of Boston Deep Sea Fishing to contractual terminations

The Court of Appeal confirmed the High Court's decision that the principles laid out in *Boston Deep Sea Fishing and Ice Company v Ansell (1888) 39 Ch D 339* ("**Boston Deep Sea Fishing**") applied so that, in circumstances where an employer did not rely on his employee's misconduct at the time of the dismissal because he did not know about it, he could nonetheless subsequently invoke such misconduct as a *defence* to a wrongful dismissal claim brought by the employee.

Those principles had been established in the context of a termination by the employer in breach of contract. The Court of Appeal concurred with the High Court in relation to this issue and held that there were no reasons why those principles could not similarly apply in a situation where the termination of the employment contract was effected pursuant to the express term(s) of the employment contract.

Burden of proof on personal expenses not discharged

The general rule is that the burden of proof rests on the party who asserts a fact. As an exception to this, in certain exceptional cases when it would be impossible or disproportionately difficult for that party to establish those facts, the Evidence Act provides that when any fact (whether affirmative or negative) is especially within the knowledge of any person, the burden of proving that fact will then rest on him/her.

The Appellant accepted that it had to establish a *prima facie* case that the Respondent's expenses were personal in nature before shifting the burden of proof onto him but then sought to rely on three fact patterns, namely:

- that the accounting practice was improper;
- the fact that some of the expenses had indeed been proved as unauthorised; and
- the fact that the Appellant had admitted to some expenses being personal

to allege that all of the expenses which were the subject of the counterclaim were personal.

The Court of Appeal dismissed the Appellant's claim in that respect. Perhaps unsurprisingly, the fact that the Appellant had not invited Tricor to testify as to the criteria it used to apply when classifying expenses as personal was viewed rather dimly by the Court and meant that the Appellant failed to discharge its *prima facie* case.

Application of English case Cavenagh in Singapore questioned

The Court of Appeal also commented that it had not been necessary for the High Court to endorse the principles laid out in the English case of *Cavenagh v William Evans Ltd* [2013] 1 WLR 238 ("**Cavenagh**"), namely, that once employment had been terminated pursuant to its contractual notice provisions, the employer could not then claim that the employment had been terminated under common law relying on the repudiatory breaches of the employee.

The Court expressed doubts as to whether *Cavenagh* should be held to be good law in Singapore but that this was a matter for consideration by the Singapore courts as and when the issue presented itself to them in the future.

CONCLUSION

This decision will be reassuring for employers that a serious breach of contract by an employee which constitutes a breach of his fiduciary duties and/or his express and implied contractual duties may indeed constitute “serious misconduct” for his summary dismissal by his employer.

The Court of Appeal found that the High Court had erred in only focusing on the nature and consequences of the breach. Where the breach in question is of a term which constitutes a condition of the contract, it would entitle the innocent party (here, the employer) to elect to treat the employment contract as discharged, regardless of the nature and consequences of the breach.

The case further highlights the importance of preparing one’s case thoroughly when seeking to recover significant sums of monies owed by an employee. In this case, whilst the Appellant did get comfort from the Court of Appeal’s decision that the Respondent’s actions had constituted serious misconduct justifying summary dismissal, its counterclaim to recover monies which the Appellant had considered to be the Respondent’s personal expenses failed, leaving it exposed to a significant financial loss.

Authors: Laure de Panafieu

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Contacts

For further information please contact:

Laure de Panafieu

Head of Employment & Incentives - Asia

(+65) 6692 5791

laure.de_panafieu@linklaters.com

Denise Bryan

Managing Associate

(+65) 6692 5845

denise.bryan@linklaters.com

Koh Shang Ren

Associate

(+65) 6692 5797

shang_ren.koh@linklaters.com

Joel Cheang

Associate

(+65) 6692 5877

joel.cheang@linklaters.com

Jolene Ang

Associate

(+65) 6692 5863

jolene.ang@linklaters.com